STATE OF MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Mary Berg,

Complainant,

Vs .

Clark A. Ilse,

St. Louis County Recorder,

Respondent.

AWARD OF ATTORNEY

FEES

and

Leta B. Pulling,

Complainant,

vs.

Clark A. Ilse, St. Louis County Recorder,

Respondent,

The above-entitled matters came on for hearing before Administrative \mathtt{Law}

Judge Peter C. Erickson on June 24 through June 27, 1986, in the St. Louis County Courthouse, Duluth, Minnesota. Each case was tried separately and the record in each matter is independent from the other. On September 10, 1986, a

decision was issued on the Berg case which found that sex discrimination had

been proved and damages were awarded. On September 24, 1986, a decision was

issued on the Pulling case which also found that sex discrimination had been

proved and damages were awarded. As part of the Order in both of these cases,

reasonable attorney's fees were awarded. However, because that issue was not addressed in the initial briefs in these matters, Complainants' counsel was permitted a period of time to submit documentation on which attorney's fees would be based. Respondent's counsel were permitted an opportunity to respond

to Complainants' request. The final submission was received on October 17, 1986.

The request for reasonable attorney's fees was submitted for both cases by Complainants' attorney, Don Paquette, 2000 Aquila Avenue North, Minneapolis,

Minnesota 55427. Respondent's attorneys Mary L. Peterson and Peter M.

Banovetz@ Assistant St. Louis County Attorneys, 501 Courthouse, Duluth, Minnesota 55802, submitted a joint response. Consequently, this Order will award attorney's fees in both cases and address the issues presented in each.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, any person aggrieved by

this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

Based upon all of the records, files and arguments of counsel, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED, that Don Paquette be awarded the amount of \$11,375 for attorney's fees in the Berg case; and

IT IS HEREBY FURTHER ORDERED, that Don Paquette be awarded the amount of \$8,125 for attorney's fees in the Pull case.

IT IS HEREBY FURTHER ORDERED, that costs in the amount of \$576.20 be awarded and split equally between the cases.

Dated this day of October, 1986.

PETER C. ERICKSON
Administrative Law Judge

MEMORANDUM

The factors to be considered in determining the reasonableness of attorney's fees are the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the $\,$ client.
- (7) The experience, reputation and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.

Code of Professional Responsibility EC 2-18 and DR 2-106; City of Minnetonka v. Carlson, 298 N.W.2d 763 (Minn. 1980).

Mr. Paquette's affidavit states that he did not keep time records $\mbox{ for his}$

work on each of these cases. Rather, he is aware only of the days he spent

working, at least in part, on one or both of the cases. These days number 60. Paquette further states that he "conservatively" estimates that he devoted more than 175 hours to the Beerg case and more than 125 hours to the Pulling case. In addition, Mr. Paquette requests that he be awarded \$576.20 for court reporter services for depositions; \$833.49 for lodging expenses while in Duluth; and \$936.00 for mileage expenses at .260 per mile for trips back and forth to Duluth. Paquette apportions these expenses equally between

the two cases. Mr. Paquette states the the normal hourly rate charged in the

community by attorneys handling human rights litigation ranges from \$100\$ to \$125 per hour. At the present time, Mr. Paquette is not engaged in the private practice of law.

Respondent has objected to the award of attorney's fees based upon the fact that Mr. Paquette does not have any time records to substantiate his claim. Additionally, Respondent has submitted affidavits showing that the normal hourly rate for an attorney of Mr. Paquette's ability and experience in

the City of Duluth is between \$50 and \$75 per hour. Lastly, Respondent objects to the award of any "costs" based on the fact that Minn. Stat.

363.071, subd. 2 only provides that "reasonable attorney's fees" may be awarded.

The first issue that must be addressed is whether Mr, Paquette is entitled

to attorney's fees absent time records to substantiate the claim. In City_of

Minnetonka, supra, the court stated in footnote 3 on page 766 that:

In the future, we strongly recommend that any attorney seeking attorneys fees pursuant to case law or statute maintain adequate written time records in all instances. The absence of written time records may require this court to reverse any award of attorneys fees absent compelling circumstances.

Although the above-lanauge is in the form of "recommendation", the Judge must

first address the lack of time records to support the award herein. First,

discussed in more detail below, these two cases were difficult cases, involving hotly disputed factual issues and complex legal issues. Mr. Paquette went forward with these cases, even after findings of no probable cause had been made by the Department of Human Rights after the "180-day" period had elapsed. His compensation for trying these cases was based only on

a successful result. Consequently, although Mr . Paquette gravely erred by not

keeping time records, the Judge will not deny an award on that basis. The

Judge has concluded that there are "compelling circumstances" to award attorney's fees in these cases absent time records.

The second issue which must be initially addressed is whether or $% \left(1\right) =\left(1\right) +\left(1\right) =\left(1\right) +\left(1\right) +\left(1\right) =\left(1\right) +\left(1\right) +\left$

may be awarded in addition to reasonable attorney's fees. Respondent cites Minn. Stat. 363.071, subd. 2 which provides only for an award of reasonable

attorney's fees without mention of costs and disbursements. Additionally, Respondent cites Rule 54.04 of the Minnesota Rules of Civil Procedure which

states $\,$ t $\,$ hat "costs and disbursements shall be allowed as provided by statute." Minn. Stat. Ch. 549 speaks to the issue of awarding costs and

disbursements. However, the statutes refer only to actions in district court

and do not specifically include administration actions brought pursuant to Minn. Stat. Ch. 363.

42 U.S.C.A. 1988 provides for "a reasonable attorney's fee" to a prevailing party in an action brought pursuant to Title VII of the Civil Rights Act of 1964. Federal case law has interpreted this language to include

reasonable and necessary expenses incurred by the attorney for the prevailing

party. Hamilton v. Cuyahoga County Welfare Department, 613 F.Supp. 170 (N.D.

Ohio 1985); Rakovich v. Wade, 602 F.Supp. 1444 (D.C. Wis. 1985); Laffey v. Northwest Airlines.-Inc., 746 F.2d. 4 (D.C. Cir. 1984); Northcross v. Board of

Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979). The federal

case law bases its interpretation, however, in part on Rule 54(d) of the Federal Rules of Civil Procedure. That rule states that, "except where express provision therefore is made either in a statute of the United States

or in these rules, costs shall be allowed as of course to the prevailing party

unless the court otherwise directs . ..". Rule 54.04 of the Minnesota Rules

of Civil Procedure state that, "costs and disbursements shall be allowed as $\ensuremath{\mathsf{S}}$

provided by statute." Minn. Stat. Ch. 549 specifically directs that costs and

disbursements be awarded to a prevailing party in actions in district court.

Because Federal Title VII actions can only be brought in federal district

court, the issue of payment of costs and disbursements to the prevailing party

in an administrative action has not been addressed. Costs and disbursements

are available to the prevailing party in federal district court pursuant to 28

U.S.C.A. 1920 which specifies taxable items.

Minn. Stat. Ch. 363 provides that persons may file a charge of discrimination with the Minnesota Department of Human Rights or may bring an ${\sf Minn}$

action in district court. Minn. Stat. 363.06, subd. 1 and 363.14, subd.

l(a). If probable cause is found by the Commissioner of Human Rights and the $\,$

matter proceeds to hearing before an Administrative Law Judge, the charging

party is represented by an attorney with the Minnesota Attorney General's

Office. Thus, an award of "reasonable attorney's fees" is not appropriate in

that situation. If the Commissioner does not make a probable cause or no

probable cause determination within $180\ \mathrm{days}$, the charging party may request

that the case be referred to the Office of Administrative Hearings for a prompt hearing. Minn. Stat. 363.071, subd. l(a). In that situation, a

charging party must proceed pro se or hire a private attorney. Additionally,

a charging party may be able to bring an action in district court even if a

charge was initially filed with the Department of Human Rights in other specified circumstances. See, Minn. Stat. 363.14, subd. 1(b).

Minn. Stat. 363.071, subd. 2 states with specificity the remedies that

are available if a discriminatory act is proved. The remedies are identical

whether the case is in district court or before an Administrative Law Judge.

The statute specifically provides that "reasonable attorney's fees" may be awarded. A prevailing party is entitled to costs and disbursements in district court, however. Because the nature of the action in district court

is identical to the proceeding before an Administrative Law Judge, the Legislature must have intended that the awards be the same in both types of

proceedings; that costs and disbursements be included in both. Consequently,

the Judge has concluded that costs and disbursements should be awarded in this

action. These costs will be equally split between the two cases.

The Judge has determined that the award of deposition expenses in this case is appropriate. This determination is within the discretion of the finder of fact. Striebel v. Minnesota State High School League, 321 N.W.2d 400 (Minn. 1982). The depositions were used by the Complainants in these cases and were necessary to prepare for the hearings as there were many disputed issues of fact. However, the Judge has determined that Mr. Paquette's travel expenses are not properly taxed as costs or disbursements, It is a general rule of law that the traveling expenses of counsel are not taxable as disbursements unless authorized by statute. See, 20 C.J.S. Costs

252 and cases cited therein. Mr. Paquette has cited no Minnesota authority which permits the assessment of counsel's travel expenses. The Judge is

aware of any authority permitting such a taxation under the statutes and rules

applicable herein. The only authority cited by Mr. Paquette is federal case

law interpreting 28 U.S.C.A. 1920, which specifies taxable items. Such is not the case under Minnesota law. Consequently, the Judge has concluded that only the deposition expenses are taxable disbursements,

The reasonableness of the attorney's fees requested must now be considered $% \left(1\right) =\left(1\right) \left(1\right) +\left(1\right) \left(1\right) \left(1\right) +\left(1\right) \left(1$

in light of the eight factors set forth above. The Judge points out that he

has presided over many cases brought pursuant to Chapter 363 and is very familiar with the types of issues involved and time needed to investigate, research and try this type of case. The Judge also points out that there is

nothing in the record to show how much investigative work was done by the Minnesota Department of Human Rights that benefited Mr. Paquette, All the record shows is that at the time the Notice and Order was issued by the Office

of Administrative Hearings, findings of probable cause or no probable cause had not been made by the Department.

(1) Time and Labor Required -- Difficulty of the Case

Mr. Paquette states that his records do show that he spent time working \circ r

these two cases on 60 days from March 27, 1986 through September 30, 1986.

estimates that at least five hours were spent per day on these cases; a total of 175 hours in the Berg case and 125 hours on the Pulling case. Although there are no time records to support this estimate, the judge has no reason to

dispute the accuracy of that number of hours. Each of these cases was difficult to prepare and try because of the openly hostile attitude of the Respondent and employees "aligned" with him in the Recorder's Office. There were many difficult legal issues in this proceeding (the Judge references his decisions, interlocutory orders, the briefs, and entire record of this proceeding) and the factual issues were difficult to prove because of the "factionalization" of the Recorder's Office. in addition, Mr. Paquette had

prepare to try two separate cases, back-to-back, each involving distinct factual circumstances. Although the legal issues in both cases were essentially the same, each had to be proved and argued based upon the record

made in that proceeding. Consequently, the Judge has determined that a total of 300 hours, 175 for Berg and 125 for Pulling, is appropriate as a basis for

Mr. Paquette's compensation.

(2) Preclusion of Other Employment

Mr. Paquette has not indicated that the acceptance of these two $\,$ cases precluded his employment in any other respect.

(3) Customary Fees Charqed in the Locality

Mr. Paquette states that "the normal hourly rate charged in the community

by attorneys handling human rights litigation ranges from \$100 to \$125 per hour." However, there is no indication which "community" Mr. Paquette is referring to or where he has obtained his information. Respondent has submitted several affidavits from attorneys located in the City of Duluth stating that the normal hourly fee in that community for similar work is between \$50 and \$75 per hour.' Because this matter was heard in Duluth, the Judge concludes that the Duluth hourly fees, which are supported by affidavits, will be used to determine the fees in this matter.

(4) The Amount Involved and the Results Obtained

In both of these cases, Mr. Paquette proved by a preponderance of the evidence that discrimination had occurred. The prevailing parties were awarded damages for mental anguish and suffering and punitive damages. In addition, Respondent was ordered to pay a civil penalty to the State of Minnesota. Because neither charging party lost her job, compensatory damages

were not awarded. The Judge considers the results obtained by Mr. Paquette, in light of the difficult "situation" in the Recorder's Office, to be the critical factor. In addition, the Judge points out that findings of no probable cause were made by the Minnesota Department of Human Rights after these cases were referred to the Office of Administrative Hearings. Motions were filed by the Respondent to dismiss on that ground.' These findings by the Commissioner of Human Rights added another level of difficulty to these proceedings.

(5) Time Limitations

These cases were "promptly" scheduled for hearing by the Office of Administrative Hearings. Several Motions were resolved prior to the days set

for hearing and Prehearing Conferences were held. Consequently, Mr. Paquette

had to prepare, in a short period of time, to try each of these cases.

(6) Nature and Length of the Professional Relationship

There is no indication that Mr. Paquette had had any professional relationship with either Ms. Berg or Ms. Pulling before he was retained to represent them in this matter.

(7) Experience, Reputation and Ability of the Attorney

Mr. Paquette does not state that he had any experience in human rights litigation and he admitted that he does not engage in the private practice of

law at this time. Thus, because of this inexperience and Mr. Paquette's

'This fee is based in part on the assumption that the attorney has little or no experience in the are of human rights litigation. This issue will be discussed, infra.

 $\,^{\shortmid} \text{The Judge}$ issued a written Order denying the Motions to $\,^{\backprime} \text{Dismiss}\,$ which is contained in the record of this matter.

apparent inability to command a high hourly rate, the Judge has concluded that the rate of \$65 per hour is appropriate in these cases.

(8) Fixed or Contingent Fee

Mr. Paquette's compensation in this matter was contingent on winning these cases and an award of "reasonable attorney's fees." Thus, Mr. Paquette risked

a great deal of his time, energies and resources to try these matters. Consequently, an award of reasonable attorney's fees as calculated above with costs and disbursements for deposition expenses is appropriate.

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